See also Vol. 3081

NO. 15763

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DIAMOND KIMM,

Appellant,

vs.

RICHARD C. HOY, District Director, Immigration and Naturalization Service,

Appellee.

APPELLANT'S PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WILLIAM M. SAMUELS
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Los Angeles 33, Calif.

Attorney for Appellant.

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TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND THE HONORABLE RICHARD H. CHAMBERS, STANLEY H. BARNES and FREDERICK G. HAMLEY, CIRCUIT JUDGES:

Appellant, Diamond Kimm, presents this, his petition for rehearing in the above entitled cause, and in support thereof, respectfully urges:

I

IN CONCLUDING THAT APPELLANT HAD BEEN AFFORDED A FAIR HEARING ON THE ISSUE OF DEPORTABILITY, THE COURT FAILED TO CONSIDER THE RECORD OF THE 1950-1951 HEARINGS IN ITS ENTIRETY.

The Court in its opinion at page 11 refers to the remarks of the Hearing Examiner at the beginning of the hearings to support its conclusion that appellant was informed that the issue of his deportability was involved. Isolated from the balance of the record the remarks quoted by the court would appear to support its conclusion. It is apparent, however, from the colloquy that followed shortly thereafter (p. 5 of the 1950 Hearing Record) that the Hearing Examiner was misinformed and did not know the nature and purpose of the hearings when he made the opening remarks. Upon inquiry and discovery in the Service file of the 1949 Assistant Commissioner's order to reopen the proceedings, the Hearing Examiner corrected the information initially imparted to appellant to the effect that a de novo proceeding was contemplated, and appellant was repeatedly informed during the course of the hearings that they were being conducted, pursuant to the order to reopen, for the purpose of determining his eligibility for suspension (pp. 18, 35, 36, 37 and 45 of Hearing Record).

Reasonably construed in its entirety, we believe that the 1950-1951 hearing record demonstrates that the Immigration Service

officers conveyed the impression to appellant that his deportability had already been adjudicated in the prior proceedings and that the sole issue involved in the later proceedings was his eligibility for suspension of deportation. This conclusion is inescapable, we respectfully urge, from the content of the remarks made by the Service officials during the course of the hearings with reference to their nature and purpose, the fact that the 1949 order to reopen was introduced in evidence, the fact that the record of the prior proceedings in 1942 was not offered in evidence nor was appellant interrogated thereon, and from the fact that no attempt was made by the Service Officers to interrogate appellant as to his student status or to otherwise adduce any evidence in that regard.

The vice of the proceedings on which the deportation order is based, we respectfully submit, is that the evidence proffered by appellant in support of his application for suspension of deportation was used by the Immigration Service as the sole basis for its determination of his deportability, and apparently is being so used by the Court, without clearly informing appellant that his deportability was in issue and without warning him in advance of his application for suspension and testimony that the same would be considered and used to determine deportability.

The record of the 1950-1951 hearings, taken in its entirety and fairly construed compels the conclusion, we believe, that there was not merely a lack of emphasis on the issue of deportability, but that it was entirely ignored.

II

THE COURT ERRONEOUSLY CONCLUDED THAT APPELLANT CONCEDED DEPORTABILITY.

We urge that in the circumstances of this case appellant could not reasonably be expected to challenge the deportability charge during the course of the 1950-1951 hearings, and his asserted failure to do so cannot be validly used to adjudicate his deportability by default. Unless appellant was clearly informed that his deportability was in issue and would be determined on the record of those hearings, he was denied an opportunity to explain, rebut and to dispel any impression which may have been created by his testimony. What may have appeared obvious, absent explanation, could conceivably have been dispelled.

Moreover, the hearing record shows that appellant submitted his application for suspension of deportation and testified thereon explicitly without admitting his deportability. (Exh. 4 attached to 1950-1951 Hearing Record).

III

THE COURT'S HOLDING RESPECTING APPLICANT'S ELIGIBILITY FOR SUSPENSION OF DEPORTATION CONFLICTS WITH PREVAILING AUTHORITY.

In its opinion the Court attempts to distinguish the Konigsberg and Schware cases, cited by appellant as controlling, on the basis that here the "verdict" was not "guilty", but "unproven". The Court appears to conclude, as a basis for distinction, that in Konigsberg and Schware findings of bad moral character were involved, whereas here there was a failure of proof of good moral character.

We respectfully point out that in neither Konigsberg nor Schware was there a finding of bad moral character presented to the Court. In both those cases (Konigsberg, p. 259; Schware, p. 234) it was stated that the refusal to certify petitioners therein was predicated on an asserted failure of proof of good moral character. In those cases, as here, the findings attacked were predicated on an asserted failure of proof of good moral character.

In Konigsberg (at page 262) the Court posed the issue presented as: "Does the evidence in the record support any reasonable doubt about petitioner's good moral character . . . ?" In Schware (at page 239) the Court stated: "Therefore the question is whether the Supreme Court of New Mexico on the record before us could reasonably find that he had not shown good moral

character."

It is plain, we believe, that the nature of the findings attacked and the issues presented for determination in Konigsberg and Schware are precisely the same as in the instant case, and we respectfully urge that the principles announced by the Supreme Court in those cases apply and are controlling here. In those cases, the Supreme Court announced the principle that no inference adverse to good moral character could be drawn from a failure to answer, under claim of constitutional protection, questions concerning political association or belief. The Court there held, in effect, that in the absence of any evidence raising substantial doubts, good moral character is established.

In the instant case it is not even contended that there is any evidence whatever adverse to appellant's good moral character. A fortiori, tested by the principles in Konigsberg and Schware, we respectfully submit, appellant has sustained the burden of establishing the requisite good moral character.

Applying the same reasoning, proof that appellant was not a member of any class made statutorily ineligible for suspension of deportation was demonstrated by the total absence of any evidence to the contrary.

IV
THE COURT ERRONEOUSLY CONCLUDED THAT THE ISSUE OF PHYSICAL PERSECUTION WAS PREMATURE.

We believe that the Court has misapprehended the basis for the relief sought by appellant in opposing deportation to Korea.

The Court's finding of prematurity, we believe, is based on the erroneous assumption that appellant here seeks review on the merits of his claim that he would be subject to physical persecution if deported to Korea. No review on the merits is sought.

Appellant seeks a judicial declaration that his rights with respect to the place of deportation, if deportable, are governed by Section 23 of the Internal Security Act, heretofore cited in appellant's briefs, and not by the pertinent provisions contained in the present Immigration Act (8 U. S. C. A. 1253 (h)). Appellant seeks further, to restrain the Immigration Service from deporting him to Korea, in the event of an adverse determination by the Service on his claim, so that the status quo will be preserved and appellant be thereby enabled to judicially test such determination. Absent such restraint, we believe, there is a real danger that appellant may be deported to Korea without an opportunity to obtain a judicial review of the lawfulness of the place fixed for his deportation, in violation of appellant's legal rights and to his irreparable damage.

On the record, it is clear that the Immigration Service has already directed that appellant be deported to Korea (Exh. A, Doc. 2, Warrant for Deportation). In the absence of judicial restraint and the declaration which appellant seeks here, the Immigration Service may proceed to deport him to Korea summarily, without regard to its final determination on the merits of appellant's claim.

We submit that the Court has jurisdiction to determine the issues here presented and to grant the relief applied for.

CONCLUSION

Appellant therefore respectfully petitions the Court for a rehearing, and in the event that a rehearing be denied, for a stay of the mandate of this Court, to permit appellant to petition the Supreme Court of the United States for a writ of certiorari.

DATED: Los Angeles, California
March 18, 1959

Respectfully submitted,

WILLIAM M. SAMUELS

Attorney for Appellant.

CERTIFICATE OF COUNSEL

The undersigned attorney for appellant certifies that in his judgment the above Petition for Rehearing is well founded and that it is not interposed for delay.

/s/ William M. Samuels

William M. Samuels

Attorney for Appellant.